THE SUSPENSION OF THE WRIT OF HABEAS CORPUS.

By Rufus E. Foster.*

In these days of world war and strife, a few words regarding the ancient, but ever vital question, the suspension of the writ of habeas corpus may be of interest. As conducive to an understanding of the true nature of the writ and the reasons for its existence, it is perhaps in order to briefly review its origin and history.

History of the Writ.

The writ of habeas corpus as defined by Chief Justice Marshall, is "a high prerogative writ known to the common law, the great subject of which is, the liberation of those who may be in prison without sufficient cause." [1]

The origin of the writ is shrouded in the mystery of antiquity. By some legal historians it is held to be founded upon Magna Carta and to be one of the concessions wrested by the barons from King John, at Runnymede, in June, A. D., 1215, but though some of the provisions of Magna Carta may be construed to support that contention, the writ was undoubtedly known to the English law before that date. It is probable that habeas corpus was originally a writ of committment and used to commit persons to jail, rather than to release them from custody, but as other forms of the capias were better known, it fell into disuse for that purpose. Prior to the 16th century the writ was used by the English high courts only as an adjunct to the writs of certiorari and privilege, in aid of their jurisdiction over the case, for the purpose of bringing before them the body of applicant.[2]

The writ began to assume its present functions in the 16th century, but its issuance was restricted to cases where the applicant was in prison and denied bail, with no prospect of a speedy trial. However, even in such cases it was not always efficacious, as the sheriff was entitled to a second and a third

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1. Ex parte Watkins, 3 Peters 201.

2. The Story of the Habeas Corpus, Edward Jenks.

summons to produce the body of the prisoner, before he could be punished for contempt, and he frequently ignored the writ altogether. This uncertainty as to the efficiency of the writ and the many arbitrary acts of the various officials led to the enactment of the celebrated Habeas Corpus Act of 1679 (31 Car. II C. 2), considered by the English people to be almost a second Magna Carta.

CONSTITUTIONAL PROVISIONS.

Considering the history and development of the writ of habeas corpus, it is not surprising that it is dear to the hearts of the Anglo-Saxon people. Before the Declaration of Independence, some of the colonies had adopted the Habeas Corpus Act of 1679. When the constitution of the United States was in the making its framers were evidently thoroughly familiar with the writ, and did not consider it necessary to provide for its issuance, though there was some discussion of the subject, ending in the adoption of Gouveneur Morris' motion, which is incorporated in art. I, sec. 9, of the constitution, practically verbatim. This section reads as follows: "The privilege of the Writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

As an evidence of the regard in which this provision has always been held by thinking men, it appears to have been copied verbatim in the constitution of the Confederate States of America, though that document was born amid the turmoil and bitterness of the Civil War. It may be well considered, therefore, as reflecting the best thought and intention of the American people.

THE MANNER OF SUSPENSION.

It will be noted that the constitution does not say whether the suspension may be by congress or the executive and merely provides that the *privilege* of the writ may be suspended and not that the writ itself may be suspended.

In England the Habeas Corpus Act of 1679 has been at times temporarily suspended by special legislation. In 1794 it was suspended by an act annually renewed until 1801, and it was also suspended in 1817. Again in 1866, it was suspended in Ireland, during a Fenian uprising.

During the civil war, President Lincoln undertook to suspend the writ by proclamation. His proclamation of May 10th, 1861, authorized the commander of the United States forces in Florida, to suspend the writ, and likewise, on July 2d, 1861, General Scott was authorized to suspend the writ at any point between New York City and Washington, where resistance to his authority might occur. Later, on October 14th, 1861, General Scott was again athorized to suspend the writ and to extend his line to Bangor, Maine. On December 2d., 1861, General Halleck was authorized to suspend the writ within the military division under his command, which then consisted of the state of Missouri. On September 24th, 1862, President Lincoln issued a general proclamation applying to the entire United States, in which he declared all persons resisting the draft subject to martial law and triable by court martial, and suspending by his own authority the writ of habeas corpus.

These suspensions of the writ by President Lincoln, however, did not meet with the unanimous approval of the jurists of the day and there was much contrariety of opinion on the subject. In an opinion given July 25th, 1861,[3] Attorney-General Bates held that the President had the power in time of insurrection to arrest anyone by executive order, and could lawfully refuse to obey a writ of habeas corpus. The attorney-general in his opinion learnedly discusses the question, and no doubt his advice was relied upon by President Lincoln in his proclamation of September 24th, 1862. Judge Smalley, holding the circuit court in Vermont, was of the same opinion, evidently, and in the case of Ex parte Field [4] decided that the president was vested with the authority to suspend the writ of habeas corpus throughout the United States in time of war, and the suspension was necessarily implied from a declaration of martial law by the president, but the writ could not be suspended by a subordinate military commander. Judge Smalley held the president's proclamation of September 24th, 1862, to be good and valid.

On the other hand, Judge Deady, in the circuit court in California, in the case of McCall v. McDowell,[5] decided that the

3. Opinions Attorney General Vol. 10, p. 74.
4. Federal Case 4761.
5. Federal Case 8673.

privilege of the writ of habeas corpus could only be suspended by congress, and he held the president's proclamation of September 24th, 1862, to be void. Judge Deady's opinion was concurred in by Judge Hall, in the circuit court in New York, in the case of Ex parte Benedict,[6] and by Chief Justice Taney in the case of Ex parte Merryman.[7] To the same effect is Chief Justice Marshall's dictum in the case of Ex parte Bollman.[8] In his opinion in the Merryman case, the chief justice learnedly and lucidly discussed the question but regarded it as too plain and well settled to be open to dispute that only congress could suspend the writ, citing the action of President Jefferson in laying the matter before congress when he considered suspension of the writ necessary in connection with the Aaron Burr conspiracy.

This conflict of opinion between the courts probably led to the passage by congress of the act of March 3rd, 1863, authorizing the president to suspend the writ. The action of congress was followed by President Lincoln's proclamation of September 15th, 1863, suspending the privilege of the writ in conformity with the act, as to all persons held by the military authorities throughout the United States. As the act of 1863 was limited to the duration of the then emergency, it is obsolete now.

The Leading Case of Ex Parte Milligan.

In 1864, while the statute and the proclamation were in force, the case of Milligan arose.[9] Milligan was a citizen of the United States, and of the state of Indiana, where he resided, and was arrested by order of Major General Hovey, commandant of the district of Indiana. He was charged with conspiring against the United States; inciting insurrection; giving aid to the enemy; violating the articles of war; and being guilty of disloyal practices. He was tried by a military commission on these charges, was convicted and sentenced to death by hanging. His sentence was under consideration by President Lincoln at the time of his death and was subsequently approved by authority of President Johnson and he was ordered executed.

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6. Federal Case 1292.
7. Federal Case 9487.
8. 4 Cranch 100.
9. 4 Wallace 2.

Milligan then applied to the circuit court of the United States for the district of Indiana for a writ of habeas corpus on the ground that the military commission was without jurisdiction to try him. The military commissions in vogue during the Civil War consisted of boards of four or five army officers appointed by the commandant of the district, to try civilians. Apparently, there was no difference between a military commission and a general court martial, except a fewer number of officers comprised the commission. There was no direct warrant in law for the appointment of these commissions, that is, congress had enacted no law prescribing their composition or defining their jurisdiction, but it had several times treated them as existing facts, by mentioning them in various acts. Their existence and general functions were well understood and approved of by the president, however.

The act of March 3rd, 1863, provided that after its passage the commissioners of all military districts, and those in charge of military prisons, should furnish to the United States attorney of the district a list of all civilians held by them, and a copy of the charges against them. Upon failure of the grand jury of the United States, at the next term of court, to indict them, the act further provided they should be entitled to their freedom.

In Milligan's case the judges of the circuit court were divided in their opinion and the case was certified to the Supreme Court. Both Milligan and the United States, were represented by distinguished counsel, among whom appeared David Dudley Field, for the petitioner, and Benj. F. Butler, for the United States.

The Supreme Court in a lengthy and learned opinion by Mr. Justice Davis, held that the privilege of the writ may be suspended in time of war in those parts of the country actually invaded or in rebellion, and persons arrested by the military authorities or by order of the president are not subject to release on habeas corpus, but the court also held that the writ of habeas corpus itself can never be suspended. If the civil courts are open and exercising their functions, the writ issues as a matter of course, and on the return made to it the court may decide whether the party applying is denied the right of proceeding any further with the application. The court further held that martial law

cannot arise from a threatened invasion. The necessity must be actual and present and the invasion real, such as to effectually close the courts and depose the civil administration. As congress had enacted a law authorizing the president to suspend the privilege of the writ of habeas corpus, of course the court was not required to determine whether the writ could be suspended by executive order or not.

Other Pertinent Opinions.

In England, it may be considered settled that the writ is *ex hypothesi* suspended within that part of the realm or possessions where martial law exists.

In 1842 a miniature revolution occurred in Rhode Island. Martial law was declared, and in construing its effect, in the case of Luther *v.* Borden,[10] the Supreme Court of the United States held that an officer of the militia acting under general orders might arrest any one he had reasonable ground to believe was engaged in the insurrection, and break into and search his house.

In an opinion rendered February 23rd, 1857,[11] Attorney General Cushing held that martial law may exist by virtue of force of circumstances in a portion of the country occupied or threatened by the enemy, and when it exists the military authority may have to take precedence of the civil authority. The latter is not deprived of its ordinary attributes, but in order to exercise them must of necessity enter into concert with the military commander.

In the argument for the United States in the Milligan case, General Butler and his associates contended that martial law is the will of the commanding officer of the armed forces, of the geographic military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief or supreme executive ruler.

The Practical Question of Suspension.

Giving full weight to the opinion of the court in Ex parte Milligan, it is evident that whether there is an actual invasion of

10. 7 Howard 1.

11. Opinions Attorney General, Vol. 8, p. 365.

designated territory, or a rebellion in active progress therein, is entirely a question of fact. Who is to determine this question of fact in the first instance but the military commander? It is well said necessity knows no law. Considering the divergence of opinion on the subject among distinguished lawyers who have given it their best thought, there can be no doubt that the doctrine of necessity is the one that will always be recognized by the military commander having the physical power to compel obedience to his orders.

The earliest historical illustration in the United States is the case of Louaillier,[12] arising in New Orleans shortly after the battle of New Orleans. General Jackson had differences with the French residents of Louisiana, many of whom had enlisted in the militia and served gallantly with the American troops against the British, and he issued a proclamation declaring martial law in Louisiana. This proclamation said nothing about the suspension of the writ of habeas corpus. Louaillier was a naturalized American, of French birth. He felt very much aggrieved at the action of the general and took occasion to express his views in the public press, whereupon Jackson had him arrested and confined in jail. His friends applied to Judge Hall, United States district judge, for a writ of habeas corpus. The judge did not issue the writ but ordered notice served on General Jackson. Thereupon General Jackson promptly jailed the judge, sent for the clerk and forcibly deprived him of the petition, also imprisoned him, and in turn imprisoned the marshal, because of their expressed determination to obey the orders of the court. All of these officials were confined by the general's orders until after reliable news was received that the treaty of peace had been signed. General Jackson was later cited for contempt by Judge Hall, found guilty and fined $1,000.00. General Jackson realized he had been wrong and willingly paid his fine, but the judge had been in jail until General Jackson decided to release him.

Chief Justice Taney encountered the same sort of defiance in issuing the writ of habeas corpus to General Cadwalader, commandant of Fort McHenry, in the case of Merryman, as that officer refused to obey the writ. The chief justice declared the

12. See No. 791, U. S. District Court, E. D. of La.

court powerless to enforce its orders, and certified the facts to the president, as commander-in-chief of the army, for such action as he might deem fit.

The whole question then, may be summed up as this: The privilege of the writ of habeas corpus may be suspended whenever the public safety requires it. Whether by executive order, or by act of congress is immaterial, for if the president takes it upon himself to do so, the practical result is that the military will be supreme and the courts powerless to interfere. Whether the president will be upheld depends entirely upon the greatest force in the world, public opinion. The rights of personal liberty, trial by jury, and freedom from unlawful seizure and search are guaranteed by the constitution. The constitution is operative in war as well as in peace. No civilian not really and actually a prisoner of war can be tried by court martial, if the civil courts are open. These rights are sacred to Americans, in common with the entire Anglo-Saxon race, and it is unthinkable that any executive, or military commander, will ever persist in an arbitrary and unlawful course in defiance of public opinion.—So. Law Qtly.